

ENTERED

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 00-CI-00706

MAY 25 2001

FRANKLIN CIRCUIT COURT
CLERK OF COURT

KENTUCKY FARM BUREAU FEDERATION, et al. PLAINTIFFS *WMB*

vs. OPINION AND ORDER

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET,
JAMES BICKFORD, SECRETARY

DEFENDANT

KENTUCKY RESOURCES COUNCIL, INC.
and SIERRA CLUB

INTERVENING
DEFENDANTS

This matter is before the Court upon cross-motions for summary judgment filed by the plaintiffs, the Kentucky Farm Bureau, et al. ("Farm Bureau") and the defendant, the Natural Resources and Environmental Protection Cabinet ("the Cabinet"). The intervening defendants, the Kentucky Resources Council and the Sierra Club, have filed a memorandum supporting the Cabinet's motion for summary judgment and contesting the standing of various plaintiffs. This Court has reviewed the record, the arguments of the parties, and the applicable law and now grants the plaintiffs' motion for summary judgment.

FACTS

Farm Bureau filed this action challenging the legality of 401 KAR 5:074E,

which utilizes discharge permits to regulate Concentrated Animal Feeding Operations ("CAFOs") in Kentucky. The regulation governing CAFOs that was the original subject of this action, 401 KAR 5:072, expired on the adjournment of the General Assembly. The Court has allowed this complaint to be amended to address 401 KAR 5:074E, which the Cabinet issued upon the expiration of 401 KAR 5:072.

401 KAR 5:072E was promulgated by the Cabinet on February 12, 2000, to establish the Kentucky Pollutant Elimination System ("KPDES") permit conditions for beef, dairy, poultry and swine CAFOs. The regulation consisted of four sections. The first established applicability to all concentrated animal feeding operations. Section 2 provided for integrator liability, while section 3 established siting and setback requirements for the location of CAFOs and land application areas. The final section mandated construction of permanent litter storage facilities at all poultry CAFOs.

On May 12, 2000, the Cabinet filed the ordinary regulation, 401 KAR 5:072, with the Compiler of Administrative Regulations. This regulation remained essentially the same as the earlier emergency regulations. On August 1, 2000, and August 24, 2000, 401 KAR 5:072 was reviewed by the Administrative Regulation Review Subcommittee and the Interim Joint Committee on Agricultural and Natural Resources. Both committees determined 401 KAR

5:072 failed to comply with applicable law. Upon adjournment of the regular session of the General Assembly on March 23, 2001, the regulation expired.

At the expiration of 401 KAR 5:072, the Cabinet filed an emergency regulation, 401 KAR 5:074E. The Plaintiffs allege this new emergency regulation is substantially the same as the expired regulation, in violation of KRS 13A.3336. The Plaintiffs further argue the new regulation is more stringent than federal law, in violation of KRS 224.16-050 (4); that the regulation exceeds the Cabinet's authority under state law; and that the regulation violates Section 2 of the Kentucky Constitution. While the Court does not believe the regulation is stricter than federal law or in excess of the Cabinet's authority, the Court now finds the regulation is substantially similar to 401 KAR 5:072. As the Cabinet cannot repromulgate a regulation substantially similar to an expired regulation for two years, the Court declares 402 KAR 5:074E void.

JUDGMENT

The parties agree that no genuine issues of material fact exist to preclude an entry of summary judgment in accordance with CR 56. Summary judgment is proper when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ky. R. Civ. Proc. 56.03. The standard for granting summary judgment is set forth in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W. 2d 476 (1991),